IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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| ERVIN BILBILI, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>CHARLES E. KLEIN, III, et al.,<br><br>Defendants. | HON. JEROME B. SIMANDLE<br><br>Civil No. 02-2953 (JBS)<br><br>**OPINION** |

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**SIMANDLE**, U.S. District Judge:

This matter arises from a fatal automobile collision between Plaintiffs and an off-duty police officer, Defendant Charles E. Klein, III, who, at the time of the accident, was allegedly intoxicated. Before the Court are the motions for summary judgment by Defendants City of Egg Harbor City, the Egg Harbor City Police Department, and Mayor James E. McGeary (collectively "Municipal Defendants") [Docket Item 74,] Defendant Richard Jankowski, Director of Public Safety for Egg Harbor City from 1996 to 2001[1] [Docket Item 75,] and Defendant Patrolman Keron Kevin Derod Craig. [Docket Item 73.]

For the reasons now explained, the motions for summary judgment will be granted in their entireties and judgment will be entered in favor of these Defendants and against Plaintiffs.

[1] Defendant Jankowski joined the motion by Municipal Defendants by letter dated January 4, 2005. [Docket Item 75.]

## I. BACKGROUND

### A. Traffic Stop

On the night of May 21, 2000, Defendant Patrolman Keron Kevin Derod Craig, a part-time/full-time officer with the Egg Harbor City Police Department, was "out on patrol" alone. (Craig Dep. Tr. at 38, 41.) At approximately 1 a.m., Craig made a routine traffic stop of a car operated and owned by Defendant Charles E. Klein, III, an off-duty police officer with the Egg Harbor City Police Department. (Id. at 46:1-4.) Craig pulled Klein over, without any apparent difficulty on Klein's part, after visually observing his car to be speeding roughly 20 miles per hour over the posted speed limit. Craig did not observe Klein's car to be swerving, and did not believe at the time that Klein was intoxicated. (Id. at 47:19-21.) Plaintiffs allege, however, that Klein was visibly intoxicated.

As Patrolman Craig pulled over Klein's car, Klein held his police badge out of the window for Craig to see. (Id. at 48:21-49:4) Craig then exited his car and approached Klein's, at which point Klein stuck his head out of the window and said "what's up." (Id. at 49:1-4.) Craig, recognizing the driver to be Klein, issued a verbal warning to slow down and then returned to his patrol car. (Id. at 49:5-8.) During this brief encounter, Craig never got closer than 30 feet to Klein. (Id. at 52:4-5.) Craig testified that he at no point believed that Klein was intoxicated. (Id. at 41:9-12.)

Craig testified at his deposition that it would have been "a problem" for him within the department to have issued a ticket to a superior police officer, such as Klein. (Id. at 54:16-20.) According to Patrolman Craig, there was an unwritten understanding in the Egg Harbor City Police Department that professional courtesy would be extended to other officers who were pulled over for minor vehicle violations. (Id. 39:14-40:2.)

B. Fatal Collision

About one hour later that same evening, Plaintiffs Freddi Bilbili and Pjerim Gjecaj were passengers in an automobile operated by Gazmend Cena. Freddi Bilbili's brother, Plaintiff Ervin Bilbili, was seated in the passenger seat, (F. Bilbili Dep. Tr. at 23; 2-4,) and Freddi Bilbili was seated in the rear seat along with Mr. Gjecaj. (Id. at 23; 2-4.) Freddi Bilbili was seated directly behind Mr. Cena and Mr. Gjecaj was seated behind the passenger seat. (Id. at 17; 14-15.) At approximately 2:12 a.m., the automobile operated by Mr. Cena was struck from behind by Klein's car. Mr. Cena died following the crash – he was pronounced dead at the Atlantic City Medical Center at 4:10 a.m. The other passengers in the car sustained serious injuries.[2]

[2] The Court included a thorough description of the injuries allegedly suffered by Pjerim Gjecaj and Freddi Bilbili in its February 15, 2005 Opinion and will not repeat those facts herein.

C. History of Klein's Misconduct and Related Discipline

Defendant Klein has a long history of poor driving. (Pls. Ex. A.) Among other things, Defendant Klein has been involved, as the driver, in at least five accidents and has committed several moving violations. (Id.) On or about November 5, 1996, for example, Klein was served with a written notice of disciplinary action for failing to notify his commanding officer that his personal car registration and New Jersey driver's license had been suspended. On December 19, 1996, a hearing was conducted at which Klein was represented by counsel. (Mun. Def. Stat. Facts ¶ 15(a).) Klein was ultimately found guilt of "misconduct," "driving while driving privileges suspended" and "allowing his vehicle to be operated on the public highways while his registration privileges were suspended," for which he was suspended for a 30 day period beginning on February 1, 1996. (Pls. Ex. B.) A three-page decision accompanying the suspension order was issued by Defendant Jankowski. (Id.)

Defendant Klein has been disciplined for other conduct as well. On or about August 4, 1997, Defendant Jankowski filed a Preliminary Notice of Disciplinary Action against Klein, seeking his removal effective September 13, 1997, based on charges arising from an off-duty incident whereby Klein discharged his gun at his home. (Mun. Def. Stat. Facts ¶ 15(b).) A hearing was convened, at which Klein was represented by counsel, and Klein

was found guilty of conduct unbecoming an officer, and of violating police department rules regarding the handling of firearms. Klein was suspended for 45 days. (Id.)

On or about April 5, 2000, Director Jankowski again filed a Preliminary Notice of Disciplinary Action against Klein, seeking his removal, based on charges that he was in possession of a controlled dangerous substance. (Id. at ¶ 15(c).) A hearing was scheduled for May 11, 2000 at which Klein was represented by counsel. Meanwhile, on or about April 26, 2000, Director Jankowski issued another Notice of Disciplinary Action against Klein based on an incident involving reckless driving while off-duty.[3] (Id. at ¶ 15(d).) A disciplinary hearing on this matter seeking Klein's suspension or removal was scheduled for June 8, 2000.[4] The fatal accident at issue here occurred on May 21, 2000.

In total, Klein was disciplined on roughly 17 different occasions between 1992 and 2000. (Mun. Def. Ex. 6.) There is, however, no dispute in this case that Klein was off duty at the

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[3] In addition, the investigating officers reported that Klein was intoxicated when they spoke with him about the incident. (Mun. Def. Stat. Facts ¶ 15(d).)

[4] Prior to that hearing, Mr. Jankowski had recommended to Mayor McGeary on at least one occasion that Klein be fired, though Defendant McGeary rejected that suggestion. (Id. at 47:1-4.) Mr. Jankowski discussed Klein's criminal and disciplinary issues with the Mayor "half a dozen times." (Id. at 56:5-6.)

time of this accident, and there is no evidence that any Municipal Defendant had knowledge that Klein was drinking and driving on the night of the accident.

D. Procedural History

Plaintiffs here are Freddi Bilbili, Ervin Bilbili, Pjerim Gjecaj, Anjaeza Bilbili (the wife of the Ervin Bilbili) and Shygyrie Cena, both as Administratrix of the Estate of Gazmend Cena and in her individual capacity. Plaintiffs filed two separate complaints in Superior Court, Atlantic County, on May 20, 2002, alleging federal § 1983 causes of action and supplemental state law claims. Notice of removal pursuant to 28 U.S.C. § 1446 was filed by Defendant Egg Harbor City on or about June 21, 2002. The two actions were consolidated in this Court by order dated August 14, 2002. [Docket Item 13.] This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

**II. SUMMARY JUDGMENT STANDARD OF REVIEW**

Summary judgment is appropriate when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" only if it might

affect the outcome of the suit under the applicable rule of law. Id. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. Id.

In deciding whether there is a disputed issue of material fact, the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party; in other words, "the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" Hunt v. Cromartie, 526 U.S. 541, 552 (1999) (quoting Liberty Lobby, 477 U.S. at 255). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Liberty Lobby, 477 U.S. at 250; Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 329-30 (3d Cir. 1995) (citation omitted).

The moving party always bears the initial burden of showing that no genuine issue of material fact exists, regardless of which party ultimately would have the burden of persuasion at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Country Floors v. Partnership of Gepner and Ford, 930 F.2d 1056, 1061-63 (3d Cir. 1991).

**III. DISCUSSION**

A. Section 1983 Substantive Due Process Claims[5]

Plaintiffs here claim a violation of the Fourteenth Amendment Substantive Due Process Clause under 42 U.S.C. § 1983, alleging that Defendants failed to protect them from a drunk driver.[6] Because Plaintiffs have failed to point to sufficient evidence of the requisite "predicate conscience-shocking behavior," their constitutional claims must be dismissed. Miller v. City of Philadelphia, 174 F.3d 368, 377 (3d Cir. 1999).

"[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion of private actors. The Clause is phrased as a limitation on the State's power to act, not as a

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[5] As an initial matter, the Egg Harbor City Police Department will be dismissed. It is well-established that in a section 1983 cause of action, police departments can not be sued in conjunction with municipalities because police departments are merely administrative arms of the local municipality and not separate judicial entities. Linden v. Spagnola, No. 99-2432, 2002 U.S. Dist. LEXIS 14573, at *17-18 (D.N.J. June 27, 2002); DeBillis v. Kulp, 266 F.Supp.2d 255, 264 (E.D.Pa. 2001).

[6] Section 1983 provides, in pertinent part:

> Every person who, acting under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

guarantee of certain minimal levels of safety and security." Id. at 195. In other words, the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Id.

Rather, the "core of the concept" of due process is "the protection against arbitrary action." County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). It is well-settled that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" Id. at 846 (citing Collins v. Harker Heights, 503 U.S. 115, 129 (1992)). DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989). And, substantive due process is violated by executive action only when it "can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense." Collins, 503 U.S. at 128.

"While the measure of what is conscience-shocking is no calibrated yardstick," Lewis, 523 U.S. at 847, those actions that would violate the "decencies of civilized conduct," Rochin v. California, 342 U.S. 165, 172-73 (1952), and which are so "'brutal' and 'offensive' that [they] do not comport with traditional ideas of fair play and decency," Breithaupt v. Abram, 352 U.S. 432, 435 (1957), certainly satisfy that standard. The

Third Circuit has "suggested" that the "shocks the conscience" test applies to all substantive due process cases. Smith v. Marasco, 318 F.3d 497, 507 (3d Cir. 2003) (citing Miller v. City of Philadelphia, 174 F.3d 368, 374-75 (3d Cir. 1999)).

Far from shocking the conscience, the behavior of the Defendants here was at most negligent. As to Defendant Craig, this Court has already held that

> although Klein was intoxicated on the night of the accident, no evidence suggests Patrolman Craig was aware of that fact. Not only did Craig not observe Klein swerving, but when he approached Klein's vehicle Craig did not observe anything that would have indicated Klein was not sober. For these reasons, Craig's failure to approach Klein's vehicle to assess whether Klein was, in fact, inebriated, was at most negligent. See Egan, 148 A.2d at 836; Mantz, 239 F. Supp. 2d at 508 (a showing of willful misconduct requires "'much more' than negligence"). To be sure, Craig testified that he never got closer than 30 feet to Klein. As a result, Craig was not able to, for example, detect the smell of alcohol on Klein's breath or look for open alcoholic beverages in the vehicle. However, his failure to do those things can, at best, be characterized as negligence as he had no knowledge of any fact indicating that Klein was drunk.

(Feb. 15, 2005 Slip Op. at 25-26 (footnote omitted).) And, "[l]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." County of Sacramento v. Lewis, 523 U.S. 833, 848-49 (1998); Fagan v. City of Vineland, 22 F.3d 1296, 1305 (3d Cir. 1994). Moreover, if Craig's failure to remove Klein from the road on the night of fatal accident does not shock the conscience, that the Municipal Defendants may have condoned Craig's decision can likewise not be

unconstitutionally arbitrary. Just like Craig, the Municipal Defendants were not "deliberately indifferent," Miller, 174 F.3d at 375, to the Plaintiffs' safety.[7]

Plaintiffs additionally argue that the defendants created the danger which allegedly caused their injuries. The state-created danger doctrine is "an exception to the general rule that the state does not have a general affirmative obligation to protect its citizens from the violent acts of private individuals." Smith, 318 F.3d at 506. Plaintiffs here maintain that the Municipal Defendants and Defendants Jankowski and Craig caused the Plaintiffs to be injured by failing to prevent an off-duty police officer with a history of misconduct from driving while intoxicated.[8] Because the acts or omissions complained of

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[7] "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy of custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 698 (1978). In fact, a municipality can only be held liable under Section 1983 when the municipality has officially sanctioned or ordered the final decision. City of St. Louis v. Prapotnik, 485 U.S. 112 (1987). As the discussion here illustrates, though, Plaintiffs were not deprived of any constitutional rights and, thus, cannot succeed under § 1983.

[8] Plaintiffs' "state-created danger" argument centers on distinct conduct: (1) Craig's failure to prevent Klein from driving following the traffic stop; (2) the implementation by the Municipal Defendants and Jankowski of a policy permitting patrolmen to extend professional courtesy to fellow officers; and (3) the failure of the Municipal Defendants and Jankowski to suspend or discharge Klein prior to the date in question. These acts will be treated together in the following discussion.

by these defendants are not sufficiently shocking or foreseeable, Plaintiffs' argument fails. Fagan v. City of Vineland, 22 F.3d 1296, 1305 (3d Cir. 1994) (holding "shocks the conscience" standard is the same in cases of government action and government omission).

Although, as noted above, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion of private actors," DeShaney, 489 U.S. at 195, state actors may be liable under § 1983 in instances of "state-created danger." A state-created danger is established upon showing: (1) the harm caused was foreseeable and fairly direct; (2) the state actor willfully disregarded the safety of others; (3) there existed some relationship between the state actor and the plaintiff; and (4) the state actor used his authority to create an opportunity for the third party's crime to occur that otherwise would not have existed. See Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996). To make a showing of state-created danger, a plaintiff must prove each of these four prongs. Even extending all favorable inferences to Plaintiffs as the parties opposing summary judgment, in this case Plaintiffs cannot make the required factual showing upon which a reasonable jury could rule in Plaintiffs' favor.

(1) Foreseeability

The harm caused to Plaintiffs here was not "foreseeable" or "fairly direct." The Court summarized the lack of directness in its February 15, 2005 Slip Opinion:

> Plaintiffs argue that if Defendants had properly disciplined Klein, he would have been removed from the force long before the accident took place. As noted above, though, Defendant Klein was off-duty on the night of the accident. Taking Plaintiffs' argument to it logical conclusion, then, Plaintiffs are asserting that if Defendants had acted properly, Klein would not have been an officer with the Egg Harbor Police Department on the night in question; Patrolman Craig would not have extended Klein any professional courtesy after pulling his vehicle over; Craig would have approached Klein's vehicle and, more likely than not, discovered evidence that Klein was inebriated; Craig would have taken some action to prevent Klein from further operating his vehicle that evening; and, finally, the fatal accident would have been prevented. That argument is attenuated at best.

(Feb. 15, 2005 Slip Op. at 26-27.) For those reasons, Plaintiffs cannot satisfy the first prong as to Municipal Defendants or Defendant Jankowski.

Similarly, Plaintiffs are unable to demonstrate that the harm caused was a foreseeable consequence of Craig's conduct. Indeed, Patrolman Craig did not know of Klein's history of misconduct involving alcohol. (Id. at 25.) As noted above, Craig was not aware, nor was there any manifestation suggesting that Klein was inebriated at the time he stopped Klein. (Id.) Craig saw Klein's vehicle speeding, no more and no less. Thus, the fatal collision that occurred shortly after he stopped Klein was not reasonably foreseeable.

(2) Willful Disregard

The Third Circuit has made clear that the wilful misconduct prong can only be satisfied by conduct that shocks the conscience. Smith, 318 F.3d at 507. This Court has already determined, though, that none of these Defendants' acts or omissions at issue meets that standard. That conclusion is dispositive of this inquiry as well.

In any event, the Court has previously held that the acts of Municipal Defendants and Defendants Jankowksi and Craig did not amount to wilful misconduct. (See Feb. 15, 2005 Slip Op. 21-28.) Specifically, the Court examined and rejected, for purposes of Plaintiffs' state law claims, the argument that the Municipal Defendants and Defendants Jankowski and Craig willfully disregarded the safety of the Plaintiffs by ignoring a foreseeable risk or danger caused by Klein. (Id. at 21-28.)

For these reasons, Plaintiffs can not meet the second requirement of the state-created danger test.[9]

[9] Because neither of the first two prongs has been satisfied, it is unnecessary for the Court to examine the final two requirements – relationship and use of authority.

The Third Circuit in Hall v. Feigan, No. 03-2784, 2004 U.S. App. LEXIS 14653, at *1 (3d Cir. July 16, 2004), was presented with similar facts and legal issues as those before the Court here.[10] There, Plaintiff Elizabeth Hall had brought a suit against Easthampton Township and certain members of the Easthampton Township Police Department, as well as others, under 42 U.S.C. § 1983 for injuries resulting from a car accident with a drunk driver. Shortly before the accident, an on-duty police officer had, through close contact with the defendant, learned that she had been drinking. In an unpublished opinion affirming the district court's decision, Civil No. 00-6254 and 01-1639 (D.N.J.) (Kugler, J.), the court summarized the facts as follows:

> On April 10, 1999, at approximately 1:45 a.m., [Plaintiff] Hall was backing out of her driveway when her car was struck by a vehicle driven by [Defendant] Tracy Feigan. As a result of the accident, Hall suffered permanent brain damage and is no longer able to take care of her child. Shortly before crashing into Hall's car, Feigan, a 27-year-old go-go dancer, had stopped at a Mobil On the Run gas station convenience store, having just left work at the Golden Moon strip club, where she had consumed at least five alcoholic beverages during her shift. When Feigan entered the Mobil On the Run, she recognized defendant Stephen Sawyer, a police officer of defendant East Hampton Township, who had stopped her for speeding approximately two months before. Sawyer was on duty at the time of the convenience store encounter.

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[10] Because Hall is unpublished, it is not binding authority. "However, because of the case's factual similarity to [this one, the Court] look[s] to the decision as a paradigm of the legal analysis" that should be followed. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 865 n.12 (3d Cir. 1996).

> Feigan was a recidivist speeder who had been classified by the State of New Jersey as a "persistent violator." She had eleven speeding convictions and her driving privileges had been suspended ten times. When Officer Sawyer had stopped Feigan for speeding approximately two months before, he had downgraded Feigan's offense and had only cited her for not wearing a seatbelt, a non-moving violation, because given the excessive number of points on her license, she would have lost her driving privileges if she had been convicted of speeding. Not surprisingly, when Feigan encountered Sawyer at the convenience store on April 10, 1999, she went up to him, kissed him on the cheek and thanked him for not giving her a speeding ticket a couple of months before. When she did so, Sawyer smelled alcohol on her breath and hence knew that she had been drinking.
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> At the time, Feigan was smoking a cigarette in the store, and Sawyer repeatedly told her to put it out. It was Sawyer's understanding that Feigan had just gotten off work at the Golden Moon, where the go-go dancers are given drinks as tips. Despite this knowledge, and the fact that he knew Feigan had been drinking and thought that she was intoxicated, and also despite the fact that Sawyer knew that she had a very poor driving record, Sawyer did not attempt to determine if Feigan was drinking and driving, or attempt to enforce the driving while intoxicated laws against her. Feigan testified that while she was talking to Sawyer in the convenience store, she probably had her keys in her hand.
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> After joking around with Officer Sawyer, Feigan left the store and got behind the wheel of her car, which was parked in front of the convenience store and easily visible to Sawyer. Less than five minutes later she crashed into Hall's car. At the time of the collision, Feigan did not have her headlights on.

Id. at *1-4.

The District Court held that Hall had not been deprived of a constitutionally protected right and, thus, granted summary judgment on the section 1983 cause of action. On appeal, Hall

raised two arguments regarding her substantive due process claims: (1) that the officer's decision not to enforce the driving while intoxicated laws against Feigan was arbitrary and capricious and shocked the conscience; and (2) that the policy of the Easthampton Township of allowing its officers "unfettered discretion" violated the Due Process Clause and that this policy authorized and encouraged the unconstitutional arbitrary and discriminatory enforcement of the law. Id. at *4. The Third Circuit rejected both arguments and affirmed the decision of the court below.

In rejecting the argument that the failure of Officer Sawyer to take action against Feigan under the facts described above satisfied the "shocks the conscience" test, the court held that "[i]n the absence of a duty to protect Hall, and in the absence of evidence that Sawyer acted in willful disregard of actual knowledge of a serious risk of Hall's safety . . ., the case does not come close to meeting the 'shocks the conscience' test." Hall, 2004 U.S. App. LEXIS 14653, at *8 (citing DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989)).

Here, the facts supporting a claim under § 1983 are even weaker than those in Hall. Indeed, the Court already has held that Craig's acts on the night of the fatal accident did not amount to willful disregard of actual knowledge of a serious risk to Plaintiffs. (See Feb. 15, 2005 Slip Op. at 25.) As noted by

the Court, Patrolman Craig testified that he was not aware of any prior instances of misconduct involving alcohol by Defendant Klein. (Id.) In Hall, on the other hand, the officer was aware of multiple violations previously committed by the driver – in fact, the reason he downgraded her offense was because he was aware of the excessive number of points on her license resulting from moving violations. Hall, 2004 U.S. App. LEXIS 14653, at *2-3. Thus, Plaintiffs' attempt to distinguish Hall on the grounds that the prior speeding incident involving Feigan was far removed in time from the fatal collision is not persuasive.

Moreover, the officer in Hall knew that Feigan had been drinking, that she had a very poor driving record and that she had her keys in her hand. Additionally, he was able to see her car from where he had been talking with her. Here, on the other hand, Craig, a part-time patrolman, did not know of Klein's record on misconduct, especially that involving alcohol; nor did he have any reason to suspect Klein of being intoxicated on the night in question. (Feb. 15, 2005 Slip Op. at 25-26.)

The second issue on appeal in Hall was the constitutionality of the police department's policy allowing "Easthampton Township police officers [to] exercise their discretion in deciding whether to charge individuals with certain driving offenses or whether to downgrade the charges, again solely at the officer's discretion." Hall, 2004 U.S. App. LEXIS 14653, at *8-9. The

court rejected that argument as well, holding that "Hall has no substantive due process right, as a third party, to be the beneficiary of non-discriminatory (here preferential) conduct allegedly directed at Feigan." Id. at *10.

> While Officer Sawyer's decision not to investigate the state of intoxication of a go-go dancer who kissed him in gratitude for previously having not ticketed her for speeding may seem unsavory, Officer Sawyer had no specific duty to conduct such an investigation under the circumstances of this case. Despite her protestations to the contrary, Hall can point to no cognizable substantive due process right that was violated in this situation.

Id. at * 10-11.

Here, Plaintiffs allege the existence of an inadequate training program giving officers the discretion to extend professional courtesies to other officers within the department during routine traffic stops. Like in Hall, Craig's decision not to further investigate Klein pursuant to that alleged policy may have been "unsavory." However, for the same reasons as the court articulated in Hall, Craig's failure to further investigate Klein's level of intoxication did not result in a deprivation of Plaintiffs' due process rights.[11]

[11] Because, as the Court concludes, there was no deprivation of Plaintiffs' substantive due process rights, the Court need not address the issues of qualified immunity. See Miller, 174 F.3d at 376 n.6 ("Because we determine that Appellants' argument on appeal does not assert a valid claim of a constitutional violation, we do not reach the issue of qualified immunity.")

B. State Law Claims – New Jersey Tort Claims Act Immunity

There remain a number of state law claims pending against the Municipal Defendants and Defendants Jankowski and Craig. Because those defendants are entitled to immunity under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. ("NJTCA" or "Act"), the state claims must be dismissed as well.

In 1972, in response to the judicial abrogation of sovereign immunity in Willis v. Department of Cons. & Econ. Dev., 264 A.2d 34 (N.J. 1970), the New Jersey State Legislature adopted the Tort Claims Act.

> The overall purpose of the Act was to reestablish the immunity of public entities while coherently ameliorating the harsh results of the doctrine. The theme of the Act is immunity for public entities with liability as the exception. Even where liability is present, the Act sets forth limitations on recovery. One is the limitation on the recovery of pain and suffering damages.

Gilhooley v. County of Union, 753 A.2d 1137, 1140 (N.J. 2000) (internal citations omitted). "The guiding principle of the Tort Claims Act is that 'immunity from tort liability is the general rule and liability is the exception' . . . ." Coyne v. New Jersey, 867 A.2d 1159, 1163 (N.J. 2005) (citing Garrison v. Tp. of Middletwon, 712 A.2d 1101, 1103 (N.J. 1998)).

Here, Defendant Craig is immune from liability under N.J.S.A. 59:3-2(b). In Perona v. Tp. of Mullica, 636 A.2d 535 (N.J. Super. Ct. App. Div. 1994), the court held that 59:3-2(b) provided immunity to "police officers in the exercise of their

police function." There, a husband and wife sued Mullica Township and two of its officers after the officers failed to take the wife, who was mentally disturbed, to a screening facility following their response to a domestic disturbance complaint. Upon arrival at the plaintiffs' residence, the husband informed the officers that he had observed his wife walking near traffic on a nearby highway. The husband also told the officers that his wife had left a handwritten note addressed to him stating, in essence, that he would never see her again and that he should take care of their daughter. The note also stated in the margin that "I loved you more than I ever showed it."

The husband informed the officers that he was concerned his wife may commit suicide, especially considering that she had been treated several weeks before for depression. Despite that information, the officers concluded (based in part on their observation that she did not seem depressed) that they could not offer assistance. Shortly after the officers departed the residence, the wife left her home and apparently attempted suicide by placing herself in front of traffic on the same nearby highway on which her husband had found her earlier.

The court in Perona held that the officers had made a "discretionary determination[]" in deciding not to take the wife to the screening facility, thereby entitling them to immunity under 59:3-2(b). Id. at 29. The court reasoned that because

"operational decisions," such as those made by the officers, are covered by 59:3-2(b), the officers were protected from liability. Id.

To be sure, N.J.S.A. 59:3-2 includes a limitation on immunity, stating that: "Nothing in this section shall exonerate a public employee for negligence arising out of acts or omissions in carrying out his ministerial functions." "A ministerial act is one which public officials are required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority and without regard to their own judgment or opinion concerning the propriety or impropriety of the act to be performed." Ritter v. Castellini, 414 A.2d 614, (N.J. Super. Ct. Law Div. 1980); see Morey, 556 A.2d at 815 (same) (citing Black's Law Dictionary 1148 (4th ed. 1968)).

Thus, for example, in Wuethrich v. Delia, 341 A.2d 365 (N.J. Super. Ct. App. Div. 1975), the court declined to extend the protections of N.J.S.A. 59:2-3 to a township where a police department failed to respond to a report of violent behavior by a man carrying a gun.[12] In that case, less than 12 hours after the first report was made to the police department, that same individual shot and killed a man. The court in Wuethrich concluded there that "once the police had received warnings as

[12] Interpretations of N.J.S.A. 59:2-3 apply equally to 59:3-2 and vice versa. Longo v. Santoro, 480 A.2d 934 (N.J. Super. Ct. App. Div.), cert. denied, 491 A.2d 706 (1984).

alleged by plaintiff, their obligation to investigate was clear. It was not discretionary but ministerial." Id. at 411.

In this case, though, unlike Wuethrich, Defendant Craig's obligation to investigate whether Klein was intoxicated was not clear. As noted several times above, Craig had no reason to believe that Klein was intoxicated when he pulled over Klein's vehicle. For that reason, Craig's obligation to detain Klein was far from clear and, thus, he was acting primarily with regard to his "own judgment or opinion concerning the propriety or impropriety of the act to be performed." Craig did testify, to be sure, to a policy of professional courtesy that patrolmen in Craig's position would generally extend to off-duty officers who were the subject of routine traffic stops. At best, though, if such a policy existed it was an "unofficial" policy that would not have "required [him] to perform upon a given state of facts in a prescribed manner." Accordingly, Craig is immune from liability under N.J.S.A. 59:3-2(b) for his failure to detain Klein or otherwise prevent him from driving while intoxicated on the night in question.

Additionally, Officer Craig is protected from liability by N.J.S.A. 59:3-3, which provides that "[a] public employee is not liable if he acts in good faith in the execution or enforcement of any law." This provision of New Jersey law is quite forgiving of the police officer who makes an imperfect response to a

situation encountered on patrol where an accident later occurs that might have been prevented by a more diligent law enforcement effort. In Morey v. Palmer, 556 A.2d 811 (N.J. Super. Ct. App. Div. 1989), for example, the court applied 59:3-3 to protect an officer from liability for failing to prevent an accident. In that case, a patrolman responded to a call that there was a pedestrian in the middle of a street. Upon arrival at the scene, the officer observed the individual to be intoxicated and ordered the individual to leave from the middle of the road, which the individual did. The officer then left the scene and, almost 4 hours later, the individual was struck and killed by a truck not far from the location where the officer had encountered him earlier. The decedent's representative sued, among others, that officer. The court there held that the officer was entitled to immunity under N.J.S.A. 59:3-3, explaining:

> So long as Officer Vinci performed some enforcement act in the chain of events leading to plaintiff's injury, subsequent omissions will also be protected under the immunity. When a sequence of events is involved, one enforcement event which constitutes an "act" will stamp the entire sequence as an "act" regardless of other events which involve failures to act. Here, Officer Vinci's discretionary election to limit his response to ordering and escorting decedent off the roadway is a sufficient "act" to secure the immunities of N.J.S.A. 59:3-3 . . . . Therefore, even if Officer Vinci was negligent in determining whether decedent was incapacitated, so long as he made that determination in good faith N.J.S.A. 59:3-3 will protect him from liability.

Id. at 816. Similarly here, Craig's "discretionary election" to

limit his response to verbally ordering Klein to drive slower is sufficient to entitle him to the immunity provided in N.J.S.A. 59:3-3.

Defendants McGeary and Jankowski are also entitled to immunity under the New Jersey Tort Claims Act. Plaintiffs allege that Defendants Klein and Jankowski failed to properly discipline Klein prior to the accident, thereby indirectly allowing the accident to occur.[13] See Corridan v. City of Bayonne, 324 A.2d 42 (N.J. Super. Ct. App. Div. 1974) (holding a jury could have held the defendant city liable for the unlawful use of a police department issued firearm by an off-duty intoxicated police officer where the city had prior knowledge of the officer's alcohol problems and violent tendencies, though not discussing questions of immunity). "Whether to discharge or retain a police officer after he or she has been charged with official misconduct is, of course, a discretionary decision." Denis v. City of Newark, 704 A.2d 1003, 1009 (N.J. Super. Ct. App. Div. 1998). New Jersey courts have not answered the question, however, "whether a public entity should be immunized from liability for exercising that discretion . . . ." Id. For the following reasons, this Court believes that if a New Jersey state court

[13] Plaintiffs have also filed claims against the Municipal Defendants based on respondeat superior liability arising from the negligence of Patrolman Craig. (Counts 26 and 27.) Because Defendant Craig is immune from liability under state law, though, Counts 26 and 27 will be dismissed as well.

were to resolve this issue as it relates to this case, it would conclude that McGeary and Jankowski should be immune from liability.

Subsection (b) of N.J.S.A. 59:2-3 "deals with the operational level of decisionmaking and does not implicate high level policy making decisions." Denis, 704 A.2d at 316 (citing Costa v. Josey, 415 A.2d 337 (N.J. 1980)). The sorts of discretionary acts which are covered by subsection (b) are those which "call[] for the exercise of personal deliberations and judgment, which in turn entail[] examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." Berel Co. v. Sencit F/G McKinley Assocs., 710 F.Supp. 530, 541 (D.N.J. 1989) (quoting Kolitch v. Lindedahl, 497 A.2d 183 (N.J. 1985) (emphasis in original omitted)). The disciplinary actions taken by Defendants McGeary and Jankowski in this case required exactly that sort of personal deliberation and, thus, give rise to their immunity.

As noted above, Jankowski issued a Notice of Disciplinary Action against Klein on April 26, 2000, based on an incident involving reckless driving while off-duty. (Mun. Def. Stat. Facts ¶ 15(d). A disciplinary hearing on this matter seeking Klein's removal was scheduled for June 8, 2000. Plaintiffs here argue that Klein should at the very least have been suspended from the Egg Harbor City police force prior to the night of the

fatal accident. Plaintiffs' argument, then, must hinge on N.J.A.C. § 4A:2-2.5(a), providing for immediate suspension of state employees.

Pursuant to N.J.A.C. § 4A:2-2.5(a), an employee may be suspended immediately, without the opportunity for a hearing, in certain limited circumstances.[14] Under subsection (a)(1):

> An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. However, a Preliminary Notice of Disciplinary Action with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.

N.J.A.C. § 4A:2-2.5(a)(1). Under the clear language of this provision, an employer having the authority to suspend an employee must necessarily exercise personal discretion and judgment in making his decision. Because suspension under subsection (a)(1) is not specifically directed but, rather, is left up to reasoned judgment, the immunity afforded by N.J.S.A. 59:2-3(b) is applicable to the decision by McGeary and Jankoswki not to suspend Klein prior to the June 8, 2000 hearing.

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[14] Only subsection (a)(1) is applicable here. Subsection (a)(2) permits immediate suspension "when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job." N.J.A.C. § 4A:2-2.5(a)(2).

"The philosophical foundation" for the "expansive insulation from suit" afforded by N.J.S.A. 59:2-3(b), is essentially the theory that "it can not be a tort for government to govern." Berel Co., 710 F.Supp. 541 (citing Amelchenko v. Freehold Borough, 201 A.2d 726, 731 (N.J. 1964)). By seeking to have this Court impose liability on Defendants McGeary and Jankoswki for not immediately suspending Klein prior to a hearing, however, that is exactly what Plaintiffs here seek to do. Such an outcome would contravene the immunity conferred by N.J.S.A. 59:2-3(b). Plaintiffs' negligence claims against Defendants McGeary and Jankowski will be dismissed.

Finally, because Defendants Craig, McGeary and Jankowski are immune from liability under the Act, the municipality is immune from liability as well.[15] N.J.S.A. 59:2-2(b) ("A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable."); see Ernst v. Borough of Ft. Lee, 739 F.Supp. 220 (D.N.J. 1990) (holding where officers were immune from liability, borough was also entitled to immunity). Therefore, as required by New Jersey law, the state law claims against Defendants Egg Harbor City and the Egg Harbor City Police Department will also be dismissed.

[15] To the extent Plaintiffs argue that these Defendants are not immune under the Act because their acts or omissions constituted wilful misconduct under the Act, this Court has already resolved that issue in favor of the defendants. (See Feb. 15, 2005 Slip Op.)

**III. CONCLUSION**

For the reasons explained above, the Court will grant the motions for summary judgment by Defendant Keron Kevin Derod Craig [Docket Item 73], Defendants Egg Harbor City, the Egg Harbor City Police Department, and James E. McGeary [Docket Item 74] and Defendant Jankowski [Docket Item 75.] The Court will dismiss all counts of the Complaint against Egg Harbor City, the Egg Harbor City Police Department, Defendant McGeary, Defendant Jankowski and Defendant Craig and enter judgment in their favor and against Plaintiffs.

The accompanying Order is entered. A trial date of July 18, 2005 has been set for the claims against the remaining defendants.[16]

**June 14, 2005**
Date

**s/ Jerome B. Simandle**
JEROME B. SIMANDLE
U.S. District Court

[16] The remaining defendants are Charles E. Klein, III; Garry J. Tomasella; Sammie's Mullica Inn, Inc.; and G.T.'s Mullica Inn.